



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
FROM: Commission Secretary's Office
DATE: August 23, 2012
SUBJECT: Comments on Draft AO 2012-29
(Hawaiian Airlines)

A handwritten signature in cursive script, likely belonging to the Commission Secretary, is written to the right of the "FROM:" line.

Attached is a timely submitted comment from Ronald M. Jacobs and Lawrence H. Norton, counsel, on behalf of Hawaiian Airlines.

Attachment

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**Via Facsimile to 202-208-3333
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Mr. Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion 2012-29 (Hawaiian Airlines)

Dear Mr. Herman:

We would like to provide the Commission with some brief comments on the drafts of Advisory Opinion 2012-29 that have been placed on the Commission's agenda.

First, Draft A concludes that the attendees at the event will not be "participating" in the event as required by 11 C.F.R. §§ 114.3(c)(2)(i) or 114.4(b)(1). As we made clear in the request, the group of 20-30 individuals will be executives in the travel and tourism industry. They are being invited for the express purpose of participating in a round-table discussion with each of the candidates about important issues. Participants will have an opportunity to interact with the candidates; indeed, that is the very purpose of the event.

These are not "limited guests and observers" as the Commission considered in the rulemaking process. Limited guests and observers suggests a passive role, such as listening to a speech. Here, the invited guests are being invited for the purpose of interacting with the candidates. Nothing in the term "participants" suggests a more expanded speaking role or other position is required. This is because there are separate descriptions of guests who are speaking at the event or being honored for the event. Thus, "participating" must mean something different than "speaking" or "being honored."

To extrapolate from the Commission's rejection of the "limited guests and observers" that the Commission never intended to allow a roundtable discussion is nothing more than speculation not supported by anything in the rulemaking record. As the Commission stated in the E&J, "[t]his is intended to cover individuals who are part of the program." These individuals are part of the program because the program is designed as a discussion forum for executives to interact with candidates.

Second, Draft A cites to Advisory Opinion 1996-11 to show that inviting the general public to attend an event does not make it fit within the candidate appearance exception. The facts of AO 1996-11 bear no resemblance to the facts of Hawaiian's proposed events. AO

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1996-11 involved 1,000 attendees, mostly from the general public, who would have no opportunity to interact with the candidates or ask questions. Hawaiian's event will involve 20-30 individuals who are invited for the express purpose of interacting with the candidates.

Third, Hawaiian's request focused on the regulations governing events with employees beyond the restricted class not because the Hawaiian attendees would be outside of the restricted class, but because the event would not involve Hawaiian expressly advocating for a candidate, would not involve coordination with the candidate, would not include solicitations of contributions, and would involve the two candidates on the general election ballot. In other words, irrespective of the Hawaiian attendees, the events fit within the framework of events for those beyond the restricted class. If the Commission wishes to consider the request under the more permissive restricted class framework, it may do so, as the concept of participation appears to be identical for both.

Finally, we note that Draft A is very quick to jump to the conclusion that the costs of these events are contributions and not expenditures. Before *Citizens United* the distinction did not matter with respect to corporations. Now, however, there is a difference, and we believe the Commission will have to be more cautious in determining what is an expenditure and what is a contribution. It need not reach that issue in order to approve Hawaiian's proposed events, but should be mindful that there are many reasons to consider the costs of the events to be expenditures and not contributions (indeed, Hawaiian believes the costs would be expenditures not coordinated with the campaign).

We appreciate your consideration of these comments on the drafts and look forward to answering any additional questions you may have at today's hearing.

Respectfully submitted,



Ronald M. Jacobs
Lawrence H. Norton